IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-514

THOMAS D. McDONALD,
PETITIONER

VERSUS

HONORABLE DAVID HEADRICK, AS SHERIFF OF MADISON COUNTY, ALABAMA, AND CHARLES F. EDGAR, JR., SURETY,
RESPONDENTS

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDICIES

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BRIEF AND ARGUMENT FOR RESPONDENTS

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Criminal Appeals of Alabama affirming the petitioner's conviction[1] is reported as follows:

[1] The Petition states, at page 2 under "Opinions Below", that the Petitioner was convicted of ". . . accepting a bribe' . . .". This is a mistatement. The issues in this case from indictment on have been: (1) Does the Alabama Statute outlaw offering to accept a bribe? (2) Did the indictment charge an offer to accept a bribe? (3) Was there sufficient evidence to prove that the Petitioner offered to accept a bribe?

The State Courts, in line with their earlier cases, ruled: (1) The statute outlaws both the taking of bribes and the offering to take bribes. (2) The indictment charged in the alternative both the taking of a bribe and an offer to take a bribe. (3) There was sufficient evidence to prove that the Petitioner offered to accept a bribe.

McDonald v. State 57 Ala. App. 529, 329 So 2d 583 (1975)

The order of the Supreme Court of Alabama quashing, as improvidently issued, the writ of certiorari issued to review the above opinion of the Court of Criminal Appeals of Alabama is reported as follows:

McDonald v. State 295 Ala 410, 329 So 2d 596 (1976)

The order of this Honorable Court denying a writ certiorari to review the conviction is reported as follows:

McDonald v. Alabama 429 U.S. 834, 50 L. Ed. 2d 99, 97 S. Ct. 99 (1976)

The order of the United States District Court for the Northern District of Alabama denying the Petitioner a writ of Habeas Corpus is not reported but is attached to the Petition. (Petition pages 5a-14a).

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of the writ is reported as follows:

McDonald v. Headrick, Sheriff, etc., et al, (5th Cir., 1977) 554 Fed. 2d 253.

JURISDICTION

The Petitioner seeks the writ under Title 28 United States Code, Section 1257(3).

QUESTIONS PRESENTED

1. Does Federal Habeas Corpus lie to review a state interpretation of a State statute?

2. Does Federal Habeas Corpus lie to review the question of whether there is some evidence of an element of the *corpus delecti* of a State crime?

3. Was there some evidence of a bilateral agreement?

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent denys that this case involves any Constitutional provision, but the Petitioner is asserting a claim under the Fifth and Fourteenth Amendments to the Constitution of the United States. These provisions are set out at pages 2-3 of the Petition.

STATUTORY PROVISIONS INCLUDED

Title 28 United States Code, § 2254.State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

Title 14§§ 63 and 64, Code of Alabama, 1940 (recomp. 1958), the same being voluminous and are attached hereto as Appendix "A". However, for the convenience of this Honorable Court they are presented here in an abridged form with the language not relevant to this proceeding deleted:

Title 14§ 63: "BRIBERY OF . . . JUDICIAL OFFICERS ____ "Any person who corruptly of-

fers, promised or gives to any . . . judicial officer . . . any gift, gratuity, or thing of value, with the intent to influence his act, vote, opinion, decision or judgment, on any cause, matter, or proceeding, which may be pending, or may be by law brought before him in his official capacity, shall on conviction be imprisoned in the penitentiary for not less than two nor more than ten years."

Title 14 §64: "ACCEPTING BRIBE BY SUCH OFFICER ____ "Any . . . judicial officer . . . who corruptly accepts or agrees to accept any gift, gratuity or other thing of value, or promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with the understanding that his act, vote, opinion, decision or judgment is to be given in any particular manner, or upon any particular side of any cause, question or proceeding, which is pending or may be by law brought before him in his official capacity . . . shall on conviction be imprisoned in the penitentiary for not less than two nor more than ten years."

STATEMENT OF THE CASE

The Petitioner was indicted for bribery by the Grand Jury of Madison County, Alabama, under Title 14, § 64, Code of Alabama, 1940 (recomp. 1958) Appendix "A". Said statute forbids, among other things, any judicial officer from accepting or agreeing to accept anything of value or promise of a thing of value under an agreement or with the understanding that his actions will be upon any side of any cause. The indictment tracked the statute and charged the Petitioner with accepting or agreeing to accept

the sexual favors or promise of sexual favors of Myra Braidfoot under an agreement or with the understanding that the Petitioner in his official capacity as County Judge would favorable dispose of a case then pending before him which involved Mrs. Braidfoot and her husband. (Appendix "B") (R. pp. 9 and T.R.[2] p. 2)

Issue was joined on the indictment. The cause was tried by a jury, which returned a verdict of guilty. The Petitioner was adjudged guilty in accordance with the verdict and sentenced to three years imprisonment. (T.R. pp. 1499)

Appeal was prosecuted to the Court of Criminal Appeals of Alabama. On this appeal the Petitioner argued: (1) The State Statute required proof of a "bilateral agreement" between the bribe giver and the bribe receiver, and (2) there was no proof of a "bilateral agreement" since the bribe receiver never intended to go through with the bribery scheme. The Court of Criminal Appeals of Alabama rejected this argument on its first premise holding that, (1) the Statute condemned unilateral offers to accept bribes and (2) the evidence of the Petitioner's offer to accept sexual favors for "taking care of Mrs. Braidfoot's case" was sufficient to support the conviction. *McDonald v. State* 57 Ala App 529, 329 So 2d 583 (1975). On petition of the Petitioner, the Alabama Supreme Court issued a Writ of Certiorari to review the affirmance by the Court of Criminal Appeals, however, on March 9, 1976, the Supreme Court quashed the writ as improvidently granted. *McDonald v. State* 295 Ala 410, 329 So 2d 596 (1976)

At this point, the Petitioner "Federalized" his claim by asserting, not withstanding the rejection of his argument

[2] "T.R." refers to the trial record, i.e., Respondents' Exhibits I-IX.

by the State Courts, that the statute required proof of a "bilateral agreement" and claiming, in this Honorable Court, that there was no proof of this "element of the corpus delecti." This Honorable Court declined to review the Petitioner's claim on October 4, 1976. *McDonald v. Alabama* 429 U.S. 834, 50 L. Ed. 2d 99, 97 S. Ct. 99 (1976) T.R. pp. 8-9)

Fifteen days later, on October 19, 1976, the Petitioner instituted the instant proceedings by filing a petition for a writ of habeas corpus in the U.S. District Court for the Northern District of Alabama. The claim was again that the statute allegedly required proof of a bilateral agreement and there was no evidence of such an agreement. On December 29, 1976, the District Court reluctantly denied the writ holding that it had no jurisdiction to revise the state interpretation of the State statute and that there was not a total lack of evidence to support the conviction.[3] (R. pp. 2-45, 148-154 and 177-178)

Appeal was taken to the United States Court of Appeals for the Fifth Circuit. That Court placed the case on the Summery Calendar, and, on June 20, 1977, affirmed the District Court writing as follows in pertinent part:

> "Alabama courts have interpreted the statute under which appellant was charged to proscribe even unilateral offers to accept bribes. In affirming ap-

[3] The District Court wrote in pertinent part: "The only constitutional issue before this Court is whether there was a total absence of evidence to support Petitioner's conviction. The Court has examined the pleadings, exhibits, and the excellent briefs submitted by the parties. In spite of a great feeling of compassion of the Petitioner, this Court cannot say that there was a total absence of evidence upon which the conviction was based."

pellant's conviction on direct appeal, the Alabama Court of Criminal Appeals held that:

> 'The Alabama statute condemns an offer to accept a bribe by promise of a "thing of value," and a conviction may be had on proof that an offer to accept by an accused was made in exchange for his official partiality in matters pending before him.'
>
> "*McDonald v. State*, 329 So. 2d 583, 595 (Ala. Cr. App. 1975), writ of certiorari quashed as improvidently granted, 329 So. 2d 596 (Ala. 1975), cert. denied, 429 U.S. 834, 97 S. Ct. 99, 50 L. Ed. 2d 99 (1976). No Alabama court has construed Ala. Code tit. 14 § 64 to require proof of a bilateral agreement. We find no error in the district court's holding that there was not a total lack of relevant evidence to support the conviction. The judgment below is: "AFFIRMED."

From this holding, review is once again sought in this Honorable Court.

STATEMENT OF THE FACTS

On the trial of the case it was proven that in November and December, 1971, the Petitioner was Judge of the County Court of Madison County, Alabama. Among the cases then pending before the Petitioner at that time was the preliminary hearing of Mrs. Myra Layton Braidfood and her husband. Mrs. Braidfoot testified that during that period she was called to the Petitioner's chambers on three occasions. On each of these occasions, she testified, the conversations with the Petitioner did not concern her case,

the only business they had between them, but the Petitioner did comment on how attractive Mrs. Braidfoot was. On the third occasion, the following occurred:

"Q. What happened the third time, please ma'am?

"A. Well, we were in his Chambers again, and as we were getting up to leave he asked me if I could meet him at Kings Inn at 10:00.

"THE COURT: Asked you what?

"A. If I could meet him at Kings Inn at 10:00.

"Q. The Defendant asked her if she could meet him at the Kings Inn at 10:00.

"THE COURT: All right. I'm just a little hard of hearing.

"Q. Did he touch you or anything at that time, squeeze you?

"*A. He put his arm around my waist.*

"Q. This Defendant, Thomas McDonald?

"A. Yes, sir.

"*Q. And were you alone in his office?*

"*A. Yes, sir.*

"Q. And what again did he say now, other than meeting at the Kings Inn?

"*A. He said if I met him at Kings Inn we could talk about the situation and maybe take care of it.*

"*Q. Of the case?*

"*A. Yes, sir.*

"Q. All right. If you met him at the Kings Inn at 10:00, what did you tell him?

"*A. I told him that I would.*

"Q. What, if anything did you do then?

"A. I left Huntsville and went to Decatur to my attorney Ralph Slate and told him of the situation." (T.R. pp. 186 and 187) (Emphasis supplied)

On hearing Mrs. Braidfoot's report, the attorney arranged to have the case transfered out of the Petitioner's court. The attorney accomplished this by waiving preliminary hearing before the petitioner. (T.R. pp. 181-189, 586-587 and 590-591)

Other witnesses were presented by the State to show that the incident with Mrs. Braidfoot was a part of a recurring pattern in which female defendants in the Petitioner's court were approached with nearly identical language, and subsequently met the Petitioner clandestinely and had sexual relations with him and, as a result, had their cases or cases in which they were interested disposed of in a most favorable manner. (T.R. pp. 241-259 and 423-439)

Other witnesses obtained favorable results after the Petitioner kissed and fondled them. To one witness the

Petitioner offered a motel room key with the suggestion that she meet him there. In return, the Petitioner indicated that he would not only help the witness with her long list of forgery charges but would be available to help the witness' friends with bail bond reduction, etc.[4] (T.R. pp. 442-444 and 447-455)

The Petitioner denied everything except meeting the witnesses in his chambers and discussing their cases. (T.R. pp. 901-1177)

SUMMARY OF THE ARGUMENT

The Petitioner was not convicted of accepting a bribe, as he claims throughout his petition, but of *offering* to accept a bribe.

The basic question in this case is: what do the words, ". . . agrees to accept . . . ." in the Alabama bribery statute mean? The Alabama Courts have held that they mean: ". . . offers to accept . . . .". This interpretation is consistent with the State Courts' prior decisions on bribery. *Staggs v. State* 53 Ala App 314, 229 So 2d 756 (1974) Federal habeas corpus is not available to review and revise State interpretations of State statutes. *Sorti v. Massachusetts*, 183 U.S. 138, 46 L. Ed 120, 22 S. Ct. 72 (1901) and others.

Since a determination of whether there is any evidence to support an element of the *corpus delecti* of a state crime

[4] The extent of the scheme was revealed indirectly by the fact that, although the Tourway Inn was mentioned by the Petitioner to only one of the state's witnesses, the Petitioner had a pass key to the rooms of that motel and an arrangement with the management whereby back rooms were made available to him on a regular basis without the Petitioner's registering (T.R. pp. 595-600)

would require a determination of whether or not a given matter is an element of the *corpus delecti* and would, therefore, require a review of the interpretation of state laws, Federal habeas corpus does not lie to review such a question. *Zavarro v. Commissioner* (S.D.N.Y., 1972) 345 F. Supp 809; *Edmondson v. Warden* (4th Cir, 1964) 335 F. 2d 608.

The "no evidence" cases cited by the Petitioner uniformly involved statutory *mala prohibita* offenses, while most involved political and social disent; these cases are distinguished from the instant case on these, if no other grounds. Clearly, the Petitioner was proven guilty of agreeing to accept a bribe.

The Petitioner was charged under a statute which condemns agreeing to accept a bribe, he was indicted for agreeing to accept a bribe, convicted of the same and his conviction was affirmed on the theory that he agreed to accept a bribe. The "bilateral agreement" theory was the Petitioner's theory of the case not the State's. *Cole v. Arkansas* (333 U.S. 196, 92 L. Ed 644, 68 S. Ct 514 (1948)) does not hold that an accused has the right to impose his own theory of the case on the prosecution.

The Petitioner cannot claim to have been convicted under an unforseen interpretation of the statute, since the Petitioner's conduct was clearly wrong, and the State Court's interpretation of the statute was natural interpretation of the statute's words and was foreshadowed by earlier cases. Compare *United States v. Wurzback* 280 U.S. 396, 74 L. Ed 508, 50 S. Ct. 167 (1930).

Finally, assuming for the sake of argument, that the Petitioner could not be convicted without some evidence of

a bilateral agreement, the witness' verbal acceptance of the Petitioner's proposal creates the mutual promises that constitute a bilateral agreement. (T.R. 187)

ARGUMENT

INTRODUCTION:

THE PETITIONER WAS NOT CONVICTED OF ACCEPTING A BRIBE

All through the petition, it is stated that the Petitioner was convicted of accepting a bribe. This is a gross misstatement. A glance at the indictment shows that the Petitioner was charged in several alternatives, one of which was that he, ". . . did . . . unlawfully and corruptly . . . agree to accept . . . [a bribe] . . . ." A glance at the record or the various judicial opinions issued by state and federal courts in this protracted litigation clearly shows that the Petitioner was convicted of agreeing or offering to accept a bribe.

I

THE FEDERAL WRIT OF HABEAS CORPUS DOES NOT LIE TO REVIEW STATE INTERPRETATIONS OF STATE STATUTES

A.

BRIBERY IN ALABAMA

The basic question presented by the Petition concerns three words in the Alabama Bribery Statute: ". . . agrees

to accept . . . ." What does ". . . agrees to accept . . . ." mean? The Petitioner insists that it means: "Enters a bilateral agreement to do something . . . ." The Respondent—State insists that it means: "Offers to accept. . . ."

In the Petitioner's view he could be convicted only if it were proven (1) that he offered to accept Mrs. Braidfoot's sexual favors in return for a favorable disposition of her case, (2) she accepted his offer, and (3) intended to go through with the proposal[5]. There are many difficulties with this view.

First, the Petitioner's view ignores the gravamen of the offense. The exchange of goods and services between individuals is no crime merely because one person happens to be a public official. Even in the instant case, had there been no offer to "take care" of Mrs. Braidfoot's case, in exchange for a proposed tryst, there would have been no crime. The gravamen of bribery is the corruption of public office. The effect of an offer to accept a bribe on an office or institution is about the same whether it is accepted or not.

Second, the Petitioner's approach would make his guilt depend on Mrs. Braidfoot's intentions. It is unknown to the criminal law to make accused's guilt depend on the intent of another.

Thirdly, the acceptance of Petitioner's theory would put the State of Alabama in the position of punishing citizens who merely offer to give bribes to public officials, while allowing the same public officials to offer to take bribes with impunity.

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[5] This last is essential to the Petitioner's claim, since the evidence showed that Mrs. Braidfoot gave verbal assent to the proposal although she apparently did not intend to carry it out.

The early Alabama cases like those of other jurisdictions[6] held that offers to give bribes and, presumbly, mere offers to accept bribes[7], were not crimes. *Barefield* v. *State* 14 Ala 603 (1848). However, by the 1970's, the bribery statutes had been amended to include language referring to offers to accept bribes. Thus, in *Staggs* v. *State* (53 Ala. App 314, 229 So 2d 756[1974]) the Alabama Appellate Court was confronted with a fact situation very similar to the instant one except that the accused was a prospective bribe giver rather than a prospective bribe receiver. In *Staggs*, the Court held that an offer to give a bribe was condemned by the bribery statute. Thus, in holding in the Petitioner's case that a mere offer to accept a bribe constitutes bribery, the Alabama Appellate Courts were following their earlier decision in *Staggs*. Had the State Courts held otherwise, it would have approved for public officials that which it condemned for private citizens in Staggs. This would have made a mockery of the concept of equal justice.

B.

THE STATE INTERPRETATION OF THIS STATE STATUTE IS BINDING ON THE FEDERAL COURTS

The question, at this point is not whether the words,

[6] See **People v. Bowles** 70 Kan 824, 79 P. 726 (1905) and **People v. Weitzel** 255 P. 792, 52 A.L.R. 811 (1927) cited by the Petitioner. The Petitioner miscites **People v. Coffey** 161 Cal 433, 119 P. 901 (1911); **U.S. v. Dietrick** (D. Neb, 1904) 126 F. 664 and **Staggs v. State** 53 Ala App 314, 229 So 2d 756 (1974) for this same proposition. **Coffey** merely held that the offeror and offeree of a bribe were accomplices to each other, while **Dietrick** held the offer to accept and the offer to give a bribe were separate offenses. Compare **Fuller v. State** 40 Ala App 297, 115 So 2d 110 (1958); Cert Den 269 Ala 657, 115 So 2d 118; Cert Den 361 U.S. 936, 4 L. Ed 2d 368, 80 S. Ct 380.

[7] The instant case was the first Alabama case on this latter point.

". . . agrees to accept . . . ." mean a bilateral agreement, an offer to accept, or something else entirely; the State Courts have ruled that they mean "offer to accept". The question here is whether Federal habeas corpus is available to review this interpretation. By the very words of the Habeas Statute, Federal habeas corpus is available only to vindicate rights, privileges, and immunities under the Constitution, laws and treaties of the United States. 28 U.S.C. 2254(a). The Petitioner claims a denial of due process in that, he claims, he was convicted without any evidence of a "bilateral agreement", but this begs the question already settled adversely to the Petitioner by the State Courts. Before it reached the Petitioner's claim, a Federal Court would have to revise the State interpretation of the State Statute. This a Federal Court cannot do on Habeas Corpus. See, e.q.*Sorti* v. *Massachusetts* 183 U.S. 138, 46 L. Ed. 120, 22 S. Ct. 72 (1901), *Parker* v. *Estelle* (5th Cir, 1974) 498 F2d 625, Cert den 421 U.S. 963, 44 L. Ed. 2d 450, 95 S. Ct. 1951, and *McKinney* v. *Parsons* (5th Cir, 1975) 513 F2d 264, and many, many others.

II

FEDERAL HABEASCORPUS DOES NOT LIE DETERMINE WHETHER THERE IS ANY EVIDENCE TO SUPPORT AN ELEMENT OF THE *CORPUS DELECTI* OF A STATE CRIME

Claims of total lack of evidence of a single element of the *Corpus delecti* present serious problems. First, such a claim could be a camouflaged attack on the probative value of the evidence. In fact, the Petitioner makes such a claim here, when he suggests that he was denied due process in that he was convicted on the alleged uncorroborated evidence of a woman who had allegedly been convicted of a crime involving

moral turpitude. Questions of the probative value of the evidence are, in our system, for the jury and are not available on habeas corpus. See *Ballard v. Howard* (6th Cir, 1968) 403 F2d 653. Similarly, such claims could be attacks on the sufficiency of the evidence masquerading in the clothing of a Federal question. It is universally held that the sufficiency of the evidence in State cases is not available on Federal habeas corpus. See, for example, *Pleas* v. *Wainwright* (5th Cir, 1971) 441 F2d 56, and *Cunha* v. *Brewer* (8th Cir, 1975) 511 F 2d 894.

Most importantly, a determination of whether or not there is any evidence to support an element of the corpus delecti, would at the outset require a determination of whether or not the point in question is an element of the *corpus delecti*. This, in turn, would require a review of the State interpretation. As discussed in some detail above, a Federal Court cannot review a State interpretation of a State law. Therefore, it follows that the question of whether or not there is any evidence to support an element of the *corpus delecti* of a State crime is not available on Federal habeas corpus. See *Zavarro* v. *Commissioner* (S.D. N.Y., 1972) 345 F. Supp 809; *Edwardson* v. *Warden* (4th Cir, 1964) 335 F 2d 608.

III

THE PETITIONER'S ARGUEMENTS

A.

THE "NO EVIDENCE" CASES DISTINGUISHED

The Petitioner has cited numerous cases, none in point, for the proposition that where there is no evidence to support an essential element of the *corpus delecti* a conviction violates due process. Actually, these cases involve simple crimes whose *corpus delectii* had but one well defined element. Many of these cases involve political and social desent. *Gregory* v. *Chicago*, 394 U.S. 111, 22 L. Ed 2d 134, 89 S. Ct. 946 (1969); *Brown* v. *Louisiana*, 383 U.S. 131, 15 L. Ed 2d 637, 86 S. Ct. 719 (1966); *Shuttleworth* v. *Birmingham*, 382 U.S. 87, 15 L. Ed 2d 176, 86 S. Ct. 211 (1965); *Barr* v. *Columbia*, 378 U.S. 146, 12 L. Ed 2d 766, 84 S. Ct. 1734 (1964); *Taylor* v. *Louisiana*, 307 U.S. 154, 8 L. Ed 2d 395, 82 S. Ct. 1188 (1962); *Garner v. Louisiana*, 368 U.S. 157, 7 L. Ed 2d 207, 82 S. Ct. 248 (1961). All of these cases were prosecutions for *mala prohibita* offenses. *Shuttlesworth* v. *Birmingham*, supra (blocking a sideworld) *Vachon* v. *New Hampshire*, 414 U.S. 478, 38 L. Ed 2d 666, 94 S. Ct. 664 (1974) contributing to the delinquency of a minor), *Garner* v. *Louisiana*, supra, *Barr* v. *Columbia*, supra, *Brown* v. *Louisiana*, supra (disturbing the peace), *Gregory* v. *Chicago*, supra, *Thompson* v. *Louisiana*, 362 U.S. 199, 4 L. Ed 2d 654, 80 S. Ct. 624 (1960). (Disorderly conduct), *Johnson* v. *Florida*, 391 U.S. 596, 20 L. Ed 2d 838, 88 S. Ct. 1713 (1968) (vagrancy).

What conceivable relevance can such cases have here? Expression, in light of the First Amendment and our commitment to a republican form of Government, has a special place in our law. The criminality of Statutory *mala prohibita* offenses is controlled solely by the Statute.

In the instant case, the Petitioner stands convicted of bribery, a *malu in se* offense. He was convicted under a statute which condemns, *inter alia*, "agreeing to accept a bribe; the State Courts interprete "agreeing to accept a bribe" to mean "offering to accept a bribe". The Petitioner

was charged by indictment with agreeing to accept a bribe. The evidence showed that he placed his arm around Mrs. Braidfoot and invited her to meet thim at a motel to discuss her case and maybe "take care" of it. The evidence also showed that the Petitioner approached other women with similar language, and later met them, had sexual relations with them and favorably disposed of their cases. Clearly, the Petitioner was proven guilty of the conduct condemned by the Statute.

B.

THE PETITIONER WAS CONVICTED OF THE CHARGED CONDUCT

The Petitioner claims that he was convicted of a crime for which he was not charged. This is not so. The indictment charged that the Petitioner agreed to accept a bribe; he was convicted of agreeing to accept a bribe and the conviction was affirmed on the theory that he agreed to accept a bribe.

The Petitioner relies here on *Rabe* v. *Washington*, 405 U.S. 313, 31 L. Ed 2d 258, 92 S. Ct. 993 (1972); *Eaton* v. *Tulsa* 415 U.S. 697, 39 L. Ed 2d 693, 94 S. Ct. 1077 (1974) and *Cole* v. *Arkansas*, 333 U.S. 196, 92 L. Ed, 644 68 S. Ct. 514 (1948). Of these, *Rabe* and *Eaton* clearly have no application[8].

On the other hand, what does *Cole* have to do with this case? The indictment is clearly drawn under Section 64. The proceedings at trial and appeal were based on Section 64. The prosecution's theory from indictment on was, is

[8] In addition to the other obvious differences, these cases both involved expression.

and will continue to be, that the convict offered to accept sexual favors from Mrs. Braidfoot in return for a favorable disposition of her case. To be sure, the convict has argued his bilateral agreement theory *ad nauseum* at each phase of these protracted proceedings, but each time he raised it he was met with vigorous adverse argument by the state and rejection by the State courts. On what conceivable basis can the convict describe the bilateral agreement theory as "the State's theory of the case"? This is *his* theory of the case. *Cole* certainly does not stand for the proposition that an accused has the right to be tried on his own theory of the case. *Cole* does not apply in any way to this case.

C.

THE PETITIONER'S CLAIM OF BEING CONVICTED UNDER AN UNFORESEEN INTERPRETATION OF A STATUTE IS FRIVOLOUS

The Petitioner claims that he was convicted under an unforseen interpretation of a state statute. This is absurd. Can the Petitioner, who at the time of these events was a lawyer and a judge, claim that he thought it was alright to offer to exchange judicial leniency for sex? Surely not!

Can it be said that the State Courts' interpretation of "agrees to accept" as "offers to accept" is outlandish? Again, surely not. This is a natural interpretation of these words and was foreshadowed by the State Courts' earlier interpretations of the State's bribery laws.[9]

An argument similar to the Petitioner's on this point was

[9] The Fifth Circuit noted: "No Alabama Court has construed Ala. Code Title 14 § 64 to require proof of a bilateral agreement."

made in *United States* v. *Wurzback* (280 U.S. 396, 74 L. Ed 508, 50 S. Ct. 167 (1930)). In that case, the argument was rejected with Justice Oliver W. Holmes writing:

> "Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk." 280 U.S. 396, 399, 74 L. Ed. 508, 510

This language was more recently quoted with approval in *Hamling* v. *United States* (418 U.S. 87, 124, 41 L. Ed 2d 590, 624, 94 S. Ct. 2887 (1974)).

Clearly, the Petitioner knew or should have known that he was, to say the least, close to the line drawn by the bribery statutes when he offered to exchange judicial leniency for sex. Clearly, he took the risk in making his infamous offer.

D.

THE PETITIONER'S CONVICTION OUGHT NOT BE SET ASIDE ON THE GROUNDS THAT HE RIAL COURT GAVE THE JURY CHARGES REQUESTED BY HIM

Convicted persons often seek new trials on the grounds that their requested charges to the Jury were denied, but this Petitioner seeks a new trial on the grounds that several of his requested charges were given. The charges in question are long, wordy and confusing. It is most difficult to ascertain their meaning and impossible to measure their accuracy as statements of law.

Trial Judges often give questionable charges requested by accused persons out of a commendable concern for the rights of accused persons and to protect the record on appeal in the event of a conviction. In any event, it is most difficult to see how the Petitioner can demand a new trial on the grounds that his requested charges were given.

IV.

THERE WAS SOME EVIDENCE OF A BILATERAL AGREEMENT BETWEEN THE CONVICT AND MRS. BRAIDFOOT

Finally, let us assume for the moment and purely for the sake of argument that the charge against the convict involved a bilateral agreement. A bilateral agreement is an agreement where there are reciprocal promises. The evidence in this case showed that the convict made an offer to Mrs. Braidfoot, if she would meet him at a motel, etc., and she gave at least verbal assent to his offer.[10] There were, then, reciprocal promises, a bilateral agreement.

The fact that Mrs. Braidfoot did not keep or even intend to keep her part of this unlawful bargain is, of course, utterly irrelevant.

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[10] Mrs. Braidfoot testified:

"Q. All right. If you met him at the Kings Inn at 10:00, what did you tell him?

"A. I told him that I would". (T.R. 187)

CONCLUSION

In conclusion the Respondents and the State of Alabama respectfully submit that the order, judgment and opinion of the United States Court of Appeals for the Fifth Circuit are patently correct, and pray that the writ be denied.

Respectfully submitted,

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APPENDICES

APPENDIX "A"

CODE OF ALABAMA, TITLE 14

§ 63. (3456) (6400) (4409) (3913) (4116) (3560) (20) Bribery of executive, legislative, or judicial officers.—Any person who corruptly offers, promises, or gives to any executive, legislative or judicial officer, or municipal officer or to any deputy clerk, agent or servant of such executive, legislative, judicial or municipal officer after his election, appointment, employment, either before or after he has been qualified, any gift, gratuity, or thing of value, with intent to influence his act, vote, opinion, decision or judgment, on any cause, matter, or proceeding, which may be then pending, or which may be by law brought before him in his official capacity, shall on conviction be imprisoned in the penitentiary for not less than two years nor more than ten years. (1935, p. 178; 1943, p. 583, appvd. July 20, 1943.)

§ 64. (3457) (6401) (4410) (3914) (4117) (3561) (21) Accepting bribe by such officer.—Any legislative, executive or judicial officer or any municipal officer, or any deputy officer, or the clerk, agent or employee of any such legislative, executive, judicial or municipal officer who corruptly accepts or agrees to accept any gift, gratuity, or other thing of value, or any promise to make any gift, or to do any act beneficial to such officer, under an agreement, or with an understanding that his act, vote, opinion, decision or judgment is to be given in any particular manner, or upon any particular side of any cause, question, or proceeding, which is pending or may be by law brought before him in his official capacity: Or that he is to make any particular appointment in his official capacity, shall, on conviction, be imprisoned in the penitentiary for not less than two years or more than ten years. (1935, p. 178; 1943, p. 584, appvd. July 10, 1943.)

APPENDIX "B"

INDICTMENT

STATE OF ALABAMA
CIRCUIT COURT, FEBRUARY TERM, 1973
MADISON COUNTY

The Grand Jury of said County charge, that before the finding of this indictment,

COUNT ONE

Thomas D. McDonald, alisa Tom McDonald, a judicial officer, to-wit: Judge of the Madison County Court, Huntsville, Madison County, Alabama, did in, to-wit: December, 1971, in or near the office of the said Thomas D. McDonald, alias Tom McDonald, in the Courthouse of Huntsville, Madison County, Alabama, unlawfully and corruptly accept or agree to accept a gift, gratuity or other thing of value, or a promise to do an act beneficial to the said Thomas D. McDonald, alias Tom McDonald, to-wit: Sexual intercourse, the promise of sexual intercourse, or the promise of other sexual favors or relationship from one Myra Layton Braidfoot, alias Myra Braidfoot Layton, a woman, under an agreement or with an understanding that his act, opinion, decision or judgment would be given in a particular manner, or upon a particular side of a cause, question, or proceeding, which by law was pending before him in his official capacity, to-wit: The cause, question or proceeding being a criminal prosecution of said Myra Layton Braidfoot, alias Myra Braidfoot Layton, wherein the said Myra Layton Braidfoot, alias Myra Braidfoot Layton, was charged with Grand Larceny under the laws of the State of Alabama, and said criminal prosecu-

tion being other identified as the *State of Alabama vs. Paul Duane Braidfoot, Myra Layton Braidfoot, Defendants,* Case No. 97467, Madison County Court, Huntsville, Madison County, Alabama, and that the said Thomas D. McDonald, alias Tom McDonald, as Judge of the Madison County Court, Huntsville, Madison County, Alabama, would dismiss or cause to be dismissed, nol-pros or cause to be nol-prossed, reduce or caused to be reduced, continue or cause to be continued, or otherwise dispose of or have disposed of, said criminal prosecution in a manner beneficial to the said Myra Layton Braidfoot, alisa Myra Braidfoot Layton, all against the peace and dignity of the State of Alabama.

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston, III, Special Assistant Attorney General of Alabama, one of the attorneys for David Headrick, Sheriff, Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 26TH. day of OCT. 1977, I did serve the requisite number of copies of the foregoing Brief and Argument and Appendices on the Attorney for the Petitioner, by mailing the same to him, first class postage prepaid, and addressed to him as follows:

Mr. Glenn F. Manning, Esq.
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